



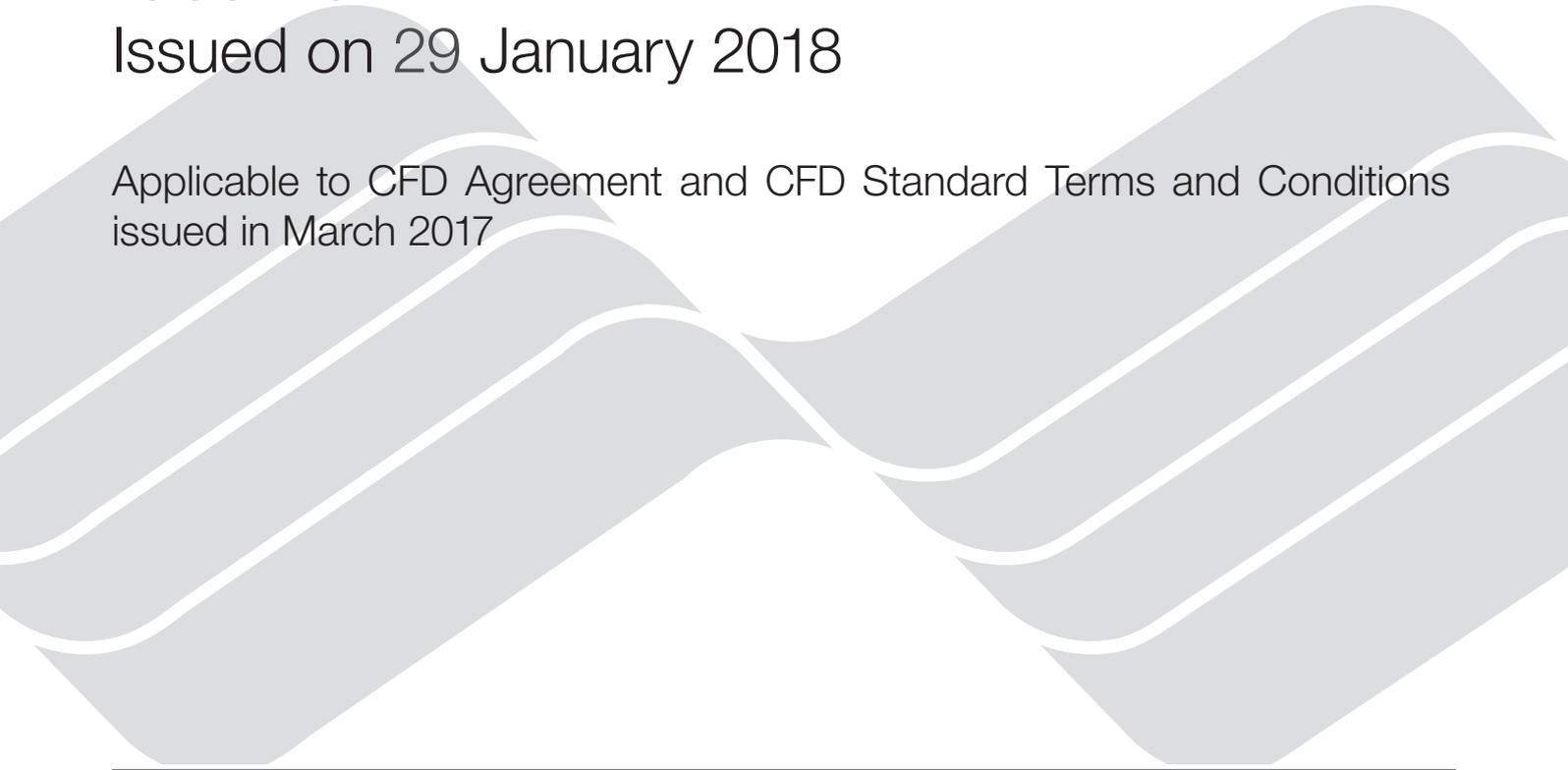
LOW CARBON
CONTRACTS COMPANY

No Cumulation of State Aid

Version 1.0

Issued on 29 January 2018

Applicable to CFD Agreement and CFD Standard Terms and Conditions
issued in March 2017



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Disclaimer

This guidance does not and is not intended to supersede or replace the provisions of the CFD. This guidance does not constitute legal or investment advice and should not be relied upon as such. Generators should consult their professional advisors where they require advice, whether legal or otherwise. LCCC further reserves the right to amend this guidance and any associated guidance from time to time.

This guidance should not be viewed as in any way restricting LCCC in the nature, type and/or amount of evidence, information and documentation it will require to satisfy itself of the Generator’s fulfilment of the Operational Conditions Precedent, nor as to the nature, level and timing of our consideration or reconsideration of the evidence that is provided. LCCC reserves the right at any time to request further or additional evidence, and to review or reconsider the evidence already provided.

Section 1: Introduction

This guidance has been prepared by Low Carbon Contracts Company Ltd (“**LCCC**”) to provide Generators awarded a CFD in the second Allocation Round (“**AR2**”) with an overview of the new provisions in the CFD template dated 13 March 2017¹ (the “**AR2 CFD**”). These provisions prevent the cumulation of State aid received under an AR2 CFD with other types of State aid or Union Funding received in relation to the costs of the Project. In particular, this document provides guidance on the new State Aid Declaration Operational Condition Precedent (“**OCP**”) which the Generator is required to fulfil before the Project can start to receive CFD payments.

- 1.1 Defined terms used in this guidance and not defined herein should be given the meaning provided in the AR2 CFD. This guidance is subject to change by LCCC from time to time².
- 1.2 Generators are encouraged to consult with LCCC and discuss their plan for satisfying the new State aid confirmation requirement, the State Aid Declaration OCP and any queries or concerns they have, at the earliest opportunity.

¹ The CFD template is the CFD template version 2 applicable to CFD Allocation Round 2 as published by the Department of Business, Energy and Industrial Strategy (“BEIS”) on 13 March 2017. <https://www.gov.uk/government/publications/contracts-for-difference-standard-terms-and-conditions-version-2-march-2017>. The CFD is comprised of the CFD Agreement (being the front section) and the FIT Contract for Difference Standard Terms and Conditions (“**Conditions**”).

² In particular, LCCC will update this guidance in due course in relation to any relevant changes to the State aid regime after Brexit.

Section 2: Background and context

State Aid Rules

- 2.1 The rules constraining the use of State aid apply to all members of the European Union (“EU”), including the UK at least while it remains a member of the EU.
- 2.2 UK public authorities have a legal obligation to comply with the EU State aid requirements. The purpose of the State aid regime is to prevent governments from giving financial advantages to organisations in a way which could distort competition across the EU. The definition of State aid is broad and is set out in Articles 107–109 of the Treaty on the Functioning of the EU. In essence, State aid is an advantage given by governments and other public authorities on a selective basis, to which could potentially distort competition and affect trade in the EU. In broad terms, an “undertaking” is an organisation or enterprise that puts goods or services onto the market. ‘An advantage’ can take many forms: it could be a grant, loan or tax break or the use of a state asset for free or at less than market price.³
- 2.3. The EU rules prohibit the giving of State aid except where it is permitted by specific EU Directives to achieve certain EU policy objectives or where the European Commission (“EC”) gives prior approval to a particular scheme or project (such as the approval given to the CFD scheme) or the aid benefits from exemption under an appropriate block exemption (e.g. the GBER⁴ or De minimis regulation⁵). In the event that there is a failure to comply with these requirements, there may be an obligation to repay unlawful aid, with interest.

Union Funding

- 2.4. Union Funding is defined in the AR2 CFD as, *“any funding from European Union resources (regardless of whether such funding constitutes State aid), including funding under the NER 300 and Horizon 2020 programmes”*. Although this type of EU funding is not State aid (unless it is paid through member state authorities), the AR2 CFD provides that it cannot be cumulated with State aid paid under the CFD.

Concept of ‘no cumulation’

- 2.5. The concept of ‘no cumulation’ relates to the principle that in order to avoid overcompensation, multiple forms of aid should not be granted in respect of the same “eligible costs”.

³ More detailed guidance on the definition of State aid can be found on the gov.uk website at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/607691/bis-15-148-state-aid-manual-update.pdf

⁴ Commission Regulation No. 651/2014

⁵ Commission Regulation No. 1407/2013

⁶ https://ec.europa.eu/clima/policies/lowcarbon/ner300_en

⁷ <https://ec.europa.eu/programmes/horizon2020/>

Section 3: The CFD Scheme and the ‘No Cumulation’ Rule

- 3.1 Payments from LCCC to Generators under CFDs are classified as State aid.⁸ The EC approved this aid being given under the CFD scheme in July 2014⁹ subject to the condition that there can be no cumulation with any other aid.¹⁰ This ensures that projects are not overcompensated by receiving multiple forms of aid. It also means that Generators cannot receive any other or additional forms of State aid or Union funding in relation to the costs of the Project.
- 3.2 Regulation 14 of the Contracts for Difference (Allocation) Regulations 2014 prohibits projects from applying for a CFD if they are in receipt of support from other subsidy schemes, such as the Renewables Obligation, Feed-in Tariff or Capacity Market. However, as State aid can be provided in many different forms (including as grants, subsidies, loans and tax exemptions), the AR2 CFD introduced provisions to prevent the cumulation of State aid under the CFD with aid not necessarily captured by these exclusions. BEIS issued a public consultation in May 2016¹¹ proposing amendments to the CFD template to prevent such cumulation. BEIS published its decision in February 2017¹² and the AR2 CFD, including such amendments, in March 2017.
- 3.3 The general principle in the AR2 CFD is that Generators must repay any such State aid or Union Funding together with interest to the grantor of that aid or funding and, if they are unable to repay it, an equivalent amount plus interest will be deducted from their CFD payments. The operation of the relevant CFD provisions is explained in more detail below.

How Do I know if I have State aid or Union Funding

- 3.4 The definition of State aid is broad, and includes any “aid granted by a Member State or through State resources in any form whatsoever”¹³. Generators that have received direct State aid or Union Funding are likely to have been told by the relevant granting authority that they are receiving State aid as it is common practice for an authority giving aid in the form of grants and loans to write to inform recipients of this at the time of award. However, regardless of whether or not the authorities have informed the Generator that it is in receipt of aid, the Generator is still responsible for ensuring that it complies with the State aid rules.
- 3.5 It is the Generator’s responsibility to make enquiries within the Generator company and any related or connected companies including companies within the same group, affiliates, previous owners and relevant subcontractors, to check whether any other State aid or Union Funding has been received in relation to the costs of the Project. We recommend that Generators seek legal advice as State aid is a complex area of law.
- 3.6 We have provided a list of illustrative examples of an advantage that we consider would be likely to constitute State aid and/or Union Funding at Table 1 of Annex 1 – i.e. situations that might potentially be problematic in relation to the ‘no cumulation’ rule relating to AR2 CFDs.

In relation to the costs of the Project

- 3.7 State aid/ Union Funding that is not allowed to be cumulated with the AR2 CFD is limited to aid/funding received “in relation to the costs of the Project”. The “Project” is defined in the CFD as meaning, “the design, development,

⁸ See Paragraph 48 of the CFD State Aid Approval, available online here: http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_36196

⁹ See above.

¹⁰ Paragraph 77 of the CFD State Aid Approval states “the aid granted by means of the CFD auction will not be cumulated with any other aid”. See also paragraph 40 to 46.

¹¹ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/521976/May_2016_CFD_Contract_Changes_Consultation.pdf

¹² [https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/589996/FINAL - Government Response to the CFD Contract Changes Consultation.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/589996/FINAL_-_Government_Response_to_the_CFD_Contract_Changes_Consultation.pdf)

*construction, conversion, instillation, completion, testing, commissioning, operation, maintenance and decommissioning of the Facility*¹⁴.

- 3.8 Therefore, if you have received State aid or Union Funding for costs which are entirely unrelated (i.e. which do not overlap either partly or fully) to the Project, then they would not be subject to the rules which prevent cumulation of State aid and/or Union Funding with aid granted under the CFD. Only in circumstances when aid is received that covers the same costs as Project costs, is it intended that cumulation will occur.

Research funding

- 3.9 For example, funding for research, development or innovation (**R&D&I**) funding is unlikely to be considered to be for the same eligible costs if it covers cost unrelated (fully or in part) to the Project e.g. for the funding of early stage fundamental research into new renewable technologies. However, where it covers costs related to the Project it will be subject to the cumulation rules. It is worth noting BEIS consultation response¹⁵ on R&D&I funding for the purposes of the 'no cumulation' provisions in the AR2 CFD. BEIS said at paragraph 33 of the consultation response that:

"We believe that most State aid or Union funding received for research, development or innovation would not be considered cumulative because this type of funding is usually aimed at covering the additional costs associated with developing new technologies or processes for wider industry benefit, rather than specifically for low carbon electricity generation at one site. The CFD does not primarily support research, development or innovation – the aim of the scheme is to support the deployment of large-scale renewable and low carbon electricity projects on a commercial basis. However, we consider that cumulation would occur where such funding is received for costs specific to the Project (for example, to conduct environmental studies necessary to secure planning consent)".

Renewable Heat Incentive

- 3.10 Please note that support under the Renewable Heat Incentive (**RHI**) is, with one exception, expressly permitted under to the CFD scheme State aid approval to be cumulated with aid under CFDs because the RHI provides support for the costs of heat generation whereas the CFD supports costs for low carbon electricity generation. RHI is therefore is permitted to be received by Projects. The exception to this being technologies which were expressly stated as not being eligible for CFDs under the allocation framework if they had applied for RHI, such as energy from waste with CHP projects.
- 3.11 We have provided illustrative examples of State aid that we consider is unlikely to be considered a cumulation of State aid with the AR2 CFD at Table 2 at Annex 1 below.

¹³ Article 107(1) of the Treaty of the Functioning of the European Union.

¹⁴ Condition 1.1.

¹⁵ See footnote 14 below

Section 4: The new AR2 CFD provisions preventing the cumulation of State Aid

Summary of new AR2 CFD provisions

4.1. The new provisions in the AR2 CFD relating to cumulation can be grouped as follows:

- a) **Provision of State aid/ Union Funding Confirmation** – contained in Conditions 3.33 and 3.34 of the AR2 CFD and further explained below in Section 4 below.
- b) **New State Aid Declaration OCP** – contained in paragraph 2.6 of Part B of Schedule 1 to the AR2 CFD and further explained in Section 5 below.
- c) **New representation and warranty** – contained in Condition 32.4 of the AR2 CFD and further explained in Section 6 below.
- d) **New undertaking** – contained in Condition 32.5 of the AR2 CFD and further explained in Section 7 below.
- e) **Suspension of CFD payments** – contained in Condition 32.6 of the AR2 CFD and further explained in Section 8 below.

Section 5: Provision of State Aid/ Union Funding Confirmation

5.1 Generators are required under Condition 3.33 to provide confirmation as to whether or not State aid and/or Union Funding has been received (unless Condition 3.34 applies). This confirmation is required at least three months before the Generator's intended Start Date

5.2 Condition 3.33 states that:

“3.33 Subject to Condition 3.34, not less than three (3) months before the Generator's intended Start Date, the Generator shall give the CfD Counterparty a written confirmation, in form and content satisfactory to the CfD Counterparty (acting reasonably), of whether any State aid and/or Union Funding has been received by the Generator or by any other person in relation to the costs of the Project, and, where applicable, details of all such State aid and/or Union Funding, accompanied by a Directors' Certificate in relation to the confirmation and the information accompanying it.”

However, under Condition 3.34 the Generators do not have to provide this confirmation if they have, at least three months before the Project's intended Start Date, fulfilled the new State Aid Declaration OCP or if such OCP has been waived by LCCC under Condition 3.28 - see Section 5 below for further detail on the State Aid Declaration OCP.

Whether Generators are required to provide the confirmation or whether, alternatively, they opt to satisfy the State Aid Declaration OCP, they will need to investigate whether any State aid or Union Funding has been received by the Generator or any other person connected to the Project in relation to the costs of the Project.

5.3 For the purposes of the 'no cumulation' provisions in the AR2 CFD Generators are required to take appropriate steps to investigate and satisfy themselves whether any State aid or Union Funding has been received by the Generator or any other person in relation to the costs of the Project. This should include:

- making all necessary enquiries within the Generator company and of any other person connected with the Project;
- giving careful consideration to the provisions of the AR2 CFD that relate to State aid and Union Funding and the meaning of State aid under EU law; and
- seeking independent legal advice where necessary.

5.4 We attach a pro forma 'State Aid/Union Funding Confirmation' at Annex 2 which Generators should use to submit the required information. A Directors' Certificate is also required, a pro forma for which is set out in Annex 8 (Notices) of the CFD. We recommend that Generators submit these documents in draft form to us first. To assist Generators, a checklist of documents for the submission is attached at Annex 6.

Section 6: New State Aid Declaration OCP

- 6.1 This Section provides guidance on the State Aid Declaration OCP¹⁶ set out in paragraph 2.6 of Part B of Schedule 1 of the AR2 CFD.
- 6.2 The general requirements for OCPs set out in Condition 3 of the CFD also apply to the State Aid Declaration OCP. Condition 3 includes the requirement for Generators to give an Operational CP Notice to LCCC in respect of each OCP together with Supporting Information to evidence the fulfilment of that OCP¹⁷. Each Operational CP Notice is required to be accompanied by a Directors' Certificate¹⁸. As with all OCPs, the new State Aid Declaration OCP must be satisfied before the Generator can start to receive CFD payments. In addition, Condition 3.7 requires the Generator to use reasonable endeavours to fulfil or procure the fulfilment of the State Aid Declaration OCP as soon as reasonably practicable, and in any event, before the Longstop Date.
- 6.3 For ease of process, we encourage you to submit your OCP Notice and Supporting Information (including a declaration in the form set out at Annex 3 or Annex 4) to LCCC in draft form first before you proceed with the formal submission.
- 6.4 The State Aid Declaration OCP requires Generators to provide a written confirmation in form and content satisfactory to LCCC that:
- a) no State aid or Union Funding has been received in relation to the costs of the Project, except State aid arising under the CFD – see paragraph 6.6 below; or
 - b) such aid or funding has been received, but has been either repaid (together with interest) to the grantor of the aid or funding – see paragraph 6.7 below; or
 - c) such aid or funding has been received, but has been expressly authorised by the EC to be cumulated with the payments under the CFD – see paragraph 6.7 below.

The full text of the State Aid Declaration OCP is as follows:

“2.6 Delivery to the CfD Counterparty of a written confirmation from the Generator, in form and content satisfactory to the CfD Counterparty (acting reasonably), that either:

no State aid or Union Funding has been received by the Generator or by any other person in relation to the costs of the Project (excluding the State aid arising under this Contract for Difference); or

State aid and/or Union Funding has been received by the Generator or by any other person in relation to the costs of the Project (excluding the State aid arising under this Contract for Difference), and that: (i) such State aid and/or Union Funding (as applicable) (adjusted for interest in accordance with Condition 3.2.11) has been repaid to the grantor of the aid or funding in full, or (ii) such State aid and/or Union Funding (as applicable) is expressly authorised by the European Commission to be cumulated with the Contract for Difference.”

- 6.5 In a similar way to the situation where a State aid confirmation is given under Condition 3.33, in order to fulfil the State Aid Declaration OCP, you will need to investigate whether or not any State aid or Union Funding has been received by the Generator or any other person (connected to the Project) in relation to the costs of the Project. See paragraphs 3.4 – 3.6 above for guidance in relation to investigations and what constitutes State aid and Union Funding for the purposes of the AR2 CFD.

¹⁶ For guidance on other OCPs please see the OCP Guidance available on our website: https://www.lowcarboncontracts.uk/sites/default/files/OCP_evidence_requirement_guidance%202.pdf

¹⁷ Condition 3.8(B).

¹⁸ Condition 3.9

State Aid Declaration OCP (2.6(A)) – no State aid or Union Funding received

6.6 To fulfil the State Aid Declaration OCP where no other State aid and/or Union Funding has been received in relation to the costs of the Project, we expect Generators to provide a declaration stating this and confirming that they have reviewed and considered the relevant provisions of the AR2 CFD restricting the cumulation of State aid and/or Union Funding, have sought legal advice where necessary (i.e. to resolve any issues or uncertainty over how the cumulation rules apply to the Project) and have made all due and careful enquiries of the Generator company and other persons connected with the Project. A pro forma 'State Aid Declaration' for OCP 2.6(A) is attached at Annex 3.

State Aid Declaration OCP (2.6(B)) – State aid and/or Union Funding has been received

6.7 To fulfil the State Aid Declaration OCP where State aid or Union Funding has been received in relation to the costs of the Project, we expect Generators to provide a declaration that such State aid/Union Funding has been received, together with details of same, but has either been:

- expressly authorised by the EC to be cumulated with the CFD; or
- repaid in full to the granter of that aid or funding together with interest (see paragraph 6.17 below for details in relation to interest calculations).

A pro forma 'State Aid Declaration' for OCP 2.6(B) is attached at Annex 4.

6.8 Generators are required to provide Supporting Information in relation to the OCP (i.e. evidencing the EC authorisation or repayment). Supporting Information that is likely to satisfy LCCC that this OCP 2.6(B) has been fulfilled includes:

- in relation to the situation where State aid or Union Funding is authorised to be cumulated, a written decision or letter from the EC to that effect; or
- in relation to the situation where State aid or Union Funding has been repaid,
 - o evidence of the original amount of aid or funding given from the granter of that aid or funding, e.g. a grant offer letter or funding agreement;
 - o evidence from the granter of the aid/funding that they have received repayment of the aid/funding in full (together with interest in accordance with Condition 32.11), such as a receipt and a bank statement; and
 - o calculations showing how the interest has been calculated.

6.9 To assist Generators, a checklist of documents for the submission is set out at Annex 6.

Waiver and Set Off

6.10 LCCC is required under Condition 3.28 to waive the State Aid Declaration OCP if a Generator has received State aid and/or Union Funding in relation to the costs of the Project but the granter refuses or is unable to accept repayment (as adjusted for interest) in full or in part. Such waiver is not required to be granted by LCCC unless the Generator provides evidence to LCCC's satisfaction that the granter refuses or is unable to accept such repayment. Condition 3.28 states that:

“3.28 The CfD Counterparty shall agree by notice to the Generator to waive the fulfilment of the State Aid Declaration Operational CP if the Generator evidences to the satisfaction of the CfD Counterparty that the granter of such State aid or Union Funding refuses or is unable to accept the repayment of the State aid or Union Funding (as adjusted for interest in accordance with Condition 32.11), in full or in part. If the Generator seeks a waiver of the State Aid Declaration Operational CP, the Generator shall:

- a) *provide the CfD Counterparty with such Supporting Information as the Generator considers to be relevant to evidence that the granter refuses or is unable to accept repayment, in accordance with this Condition; and*
- b) *provide the CfD Counterparty with such additional Supporting Information as the CfD Counterparty reasonably requires, as soon as reasonably practicable, and in any event no later than ten (10) Business Days following receipt of the CfD Counterparty's request,*

in each case accompanied with a Directors' Certificate in respect of such Supporting Information."

6.11 If the Generator considers that Condition 3.28 applies, we would expect to receive a formal written request for a waiver of the State Aid Declaration OCP which sets out:

- details of the nature and amount(s) of the aid/funding,
- details of the recipient and granter,
- date of grant and receipt of the aid/ funding,
- details of the efforts of the Generator to repay the aid/funding (with interest) to the granter, and
- a detailed explanation of the reasons why the repayment could not be made.

A pro forma 'Declaration relating to a Request for Waiver of State Aid OCP' is attached at Annex 5. 6

6.12 The Generator is also required to provide Supporting Information to evidence that the granter refuses or is unable to accept the repayment. This Supporting Information must be accompanied by a Directors' Certificate. Supporting Information that is likely to satisfy LCCC that the granter refuses or is unable to accept the repayment includes:

- clear and unequivocal written confirmation from the granter of the aid/funding that they unconditionally refuse or are unable to accept the repayment of the State aid or Union Funding in full and the reasons for same; and
- evidence to show that they were in fact the granter of the aid (e.g. a grant agreement, loan agreement, receipt, invoice).

6.13 For ease of process, we encourage Generators to submit their request for waiver and Supporting Information to LCCC in draft form first before proceeding with the formal submission. To assist Generators, a checklist of documents for the submission is attached at Annex 6.

6.14 LCCC is not required to waive the State Aid Declaration OCP unless it is satisfied that the requirements of Condition 3.28 have been met.¹⁹

6.15 Please note that, notwithstanding that the State Aid Declaration OCP may have been waived, the State aid or Union Funding still needs to be repaid to avoid cumulation. LCCC will therefore then "set off" the relevant amounts from your CFD payments in accordance with the requirements of Condition 3.31, which states:

"3.31 The Previous State Aid (as adjusted for interest in accordance with Condition 3.2.11) shall be set off against any amounts payable to the Generator under this Contract for Difference, so that no payment shall be made to the Generator until such amount has been set off in its entirety."

6.16 If LCCC agrees to waive the State Aid Declaration OCP, we are required to notify you of the amount of State aid (as adjusted for interest) which has not been repaid and the State Aid Interest Rate currently applicable.²⁰ This will assist you to understand the amount to be set off.

¹⁹ Condition 3.30

²⁰ Condition 3.29 (A)

Interest

6.17 Any State aid or Union funding that has been repaid to the granter must include interest in accordance with Condition 32.11 of the AR2 CFD, which (in summary) states that:

- interest shall accrue on the outstanding balance of any State aid and Union Funding from (and including) the date that the State aid or Union Funding was received (but not including the date of repayment);
- interest shall accrue from day to day and shall be calculated on the basis of the actual number of days elapsed and a year comprising of 365 days;
- the “State Aid Interest Rate” shall be the interest rate determined by the CfD Counterparty in accordance with the Reference Rate Methodology²¹; and
- to the extent that interest accrues for more than a year, the State Aid Interest Rate shall be recalculated on an annual basis by LCCC in accordance with the Reference Rate Methodology, and interest shall be compounded annually, so that interest accruing in the previous year shall be subject to interest in any subsequent year.

²¹“Reference Rate Methodology” means the European Commission’s methodology for setting reference rates, as contained in the “Communication from the Commission on the revision of the method for setting the reference and discount rates” (2008/C 14/02) (as such methodology may be amended, supplemented, restated or replaced from time to time);

Section 7: New Representation and Warranty

7.1 The Generator, when signing the AR2 CFD, makes a representation and warranty under Condition 32.4 that, as at the Start Date, no State aid or Union Funding has been received in relation to the costs of the Project (regardless of whether such aid or funding is received by the Generator or by any other person) other than that specified in Condition 32.4.

Condition 32.4 states as follows:

“32.4 The Generator represents and warrants to the CfD Counterparty that, as at the Start Date, the following statement is true, accurate and not misleading:

- a) no State aid or Union Funding has been received in relation to the costs of the Project (regardless of whether such aid or funding is received by the Generator or by any other person), other than:
 - i) the State aid arising under this Contract for Difference;
 - ii) any State aid or Union Funding which is expressly authorised by the European Commission to be cumulated with a Contract for Difference; or
 - iii) any State aid or Union Funding notified to the CfD Counterparty in accordance with the process for the satisfaction or waiver of the State Aid Declaration Operational CP.”

Section 8: New undertaking – relating to State Aid after the OCP Notice

8.1 The Generator is also required to provide undertakings in relation to the receipt of any future State aid in relation to the Project. These undertakings are effective from the ‘State Aid Declaration Date’ (being the date the Operational CP Notice relating to the State Aid Declaration OCP is submitted to LCCC or the date the Generator requests a waiver of same). The undertakings can be summarised as follow:

- a) to ensure that all times that no State aid or Union Funding is received in relation to the costs of the Project²² (regardless of whether such aid or funding is received by the Generator or by any other person);
- b) to notify LCCC as soon as reasonably practicable in the event that any State aid and/or Union Funding is received;
- c) at LCCC’s request, to provide evidence of compliance or non-compliance with the undertaking at Condition 32.5(A) (referred to in (i) above). This evidence must be provided as soon as reasonably practicable and in any event no later than 30 business days following receipt of a request from LCCC. The Supporting Information must be accompanied by a Directors Certificate; and
- d) to repay or procure the repayment of any State aid or Union Funding received in relation to the costs of the Project to the granter of that aid or funding together with interest.

8.2 Condition 32.5 states that:

“32.5 With effect from the State Aid Declaration Date, the Generator undertakes to the CfD Counterparty as follows:

- a) *the Generator shall at all times ensure that no State aid or Union Funding is received in relation to the costs of the Project (regardless of whether such aid or funding is received by the Generator or by any other person), other than:*
 - i) *the State aid arising under this Contract for Difference; or*
 - ii) *any State aid or Union Funding which is expressly authorised by the European Commission to be cumulated with a Contract for Difference;*
- b) *Notification: the Generator shall:*
 - i) *give notice to the CfD Counterparty as soon as reasonably practicable upon becoming aware that any State aid or Union Funding has been received in relation to the costs of the Project (regardless of whether such aid or funding is received by the Generator or by any other person, or is received before, on or after the State Aid Declaration Date) (other than any State aid or Union Funding of the types described at Condition 32.4(A)(i), (ii), and (iii)); and*
 - ii) *provide the CfD Counterparty with such Supporting Information regarding compliance or non-compliance by the Generator with the undertaking in Condition 32.5(A) as the CfD Counterparty reasonably requires, as soon as reasonably practicable and in any event no later than thirty (30) Business Days following receipt of the CfD Counterparty’s request. Any Supporting Information provided by a Generator to the CfD Counterparty under this Condition 32.5(B)(ii) shall be accompanied by a Directors’ Certificate in respect of such Supporting Information; and*

²² Note for the sake of clarity this warranty does not refer to State aid arising under the CFD itself nor to any State aid or Union funding which is expressly authorised by the European Commission to be cumulated with aid received under the CFD.

c) *Repayment: the Generator shall repay or procure the repayment of any State aid or Union Funding which has been received in relation to the costs of the Project (regardless of whether such aid or funding is received by the Generator or by any other person or is received before, on or after the State Aid Declaration Date) (as adjusted for interest in accordance with Condition 32.11) to the granter of such aid or funding (other than any State aid or Union Funding of the types described at Condition 32.4(A)(i) and (iii)).*"

- 8.3 Under Conditions 32.12 – 32.14 of the AR2 CFD, a similar waiver situation applies in the period after the State Aid Declaration OCP as applies in relation to waiver of the State Aid Declaration OCP under Condition 3.28 (as set out in paragraphs 6.10 to 6.16 above). LCCC is required under Condition 32.12 to waive the Generator's obligation to repay the aid or funding under Condition 32.5(C) if the Generator evidences to the satisfaction of LCCC that the granter of the State aid or Union Funding refuses or is unable to accept the repayment of that aid, together with interest.
- 8.4 If the Generator seeks this waiver, the information that LCCC would require is similar to the information required for a State Aid Declaration OCP waiver request – see paragraphs 6.10 to 6.16 above for details.
- 8.5 As with Condition 3.31 (see paragraph 6.15 above), it is still necessary for the State aid/ Union Funding (adjusted for interest) to be repaid to avoid cumulation. LCCC is therefore required to set-off these amounts from your CFD payments in accordance with Condition 32.15. Any suspension of CFD payments will cease when these amounts have been set-off²³.

²³ Conditions 32.13 - 32.15

Section 9: Suspension of CFD payments

9.1 LCCC is required to suspend CFD payments under Condition 32.6 of the AR2 CFD if a Generator:

- breaches the representation and warranty at Condition 32.4 which (in summary) states that as at the Start Date, no State aid and/or Union Funding has been received, or
- fails to comply with the undertakings at Condition 32.5(A) which states that at all times the Generator shall ensure no State aid and/or Union Funding is received.

Such suspension of CFD payments is required to be from the date LCCC becomes aware that the Generator has breached or failed to comply with any of the Conditions mentioned above. LCCC is required to notify Generators of any such suspension as soon as reasonably practicable.

9.2 If the Generator evidences to the satisfaction of LCCC that the State aid and/or Union Funding together with interest, has been repaid in full to the granter of the aid/funding, the suspension shall be lifted and amounts that were suspended shall be paid. A Directors' Certificate is required in relation to the evidence provided.

9.3 LCCC is also required under Condition 32.9 to suspend CFD payments if the Generator fails to provide Supporting Information requested by LCCC under Condition 32.5(B)(ii). Such suspension is required from the date LCCC becomes aware of the failure by the Generator to comply. LCCC will notify the Generator of any such suspension as soon as reasonably practicable. The suspension shall be lifted, and amounts that were suspended shall be paid, if the Generator subsequently provides LCCC with the Supporting Information that was requested under Condition 32.5(B)(ii).

Section 10: Recovery

10.1 LCCC has a right of recovery under Condition 32.16 in circumstances where the AR2 CFD expires or terminates and the Generator has not yet repaid to the grantor any amount of State aid or Union Funding together (with interest) under Condition 32.5(C) or such amount has not been set off from CFD payments in full under Condition 3.31 or 32.15. In that case, LCCC is entitled to recover any payments made to the Generator under the AR2 CFD up to the value of the outstanding amount.

Annex 1 - State Aid/Cumulation Illustrative examples

Table 1: Examples of an Advantage or Benefit that would likely Constitute State Aid

- A grant from the Government of a Member State to the Generator or parent company or subsidiary company to buy wind turbines (or parts of turbines) that are used for the Project.
- *De minimis* aid²⁴ or aid under the General Block Exemption Regulations (“GBER”)²⁵ (An authority granting *de minimis* aid has to report such aid, therefore it is normal practice for authorities to ask applicants to disclose any *de minimis* aid, and to inform recipients that they are in receipt of such aid).
- Grant towards the costs of the Project, such as towards gaining planning consent.
- The purchase of land from a Local Authority at a discount or below market rate for the Project site or for use while building the Project.
- An exemption from paying a levy relating to the Project or Project site that is imposed by a Local Authority.
- The use of a cargo ship (other than at a commercial rate) that is wholly or partly owned by a Member State to transport Project building materials to an offshore wind farm.
- Preferential terms for the use or lease of land or facilities for the Project from a public authority or arm’s length body.
- A Member State giving a guarantee for a loan obtained from an international financial institute that is used to wholly or partly finance the Project.
- State aid received for the costs of a particular product or service used for the Project or to research a particular product for use by the Project. For instance, the purchase of equipment which is a requirement of the Project’s required authorisations (for example, installing equipment to prevent environmental deterioration of a local area).
- Investment under a venture capital scheme (e.g. VCT, EIS, SEIS, SITR). These schemes have been approved by the European Commission as State aid. The entire investment in the investment fund that is received by the Generator is considered to be State aid, and therefore if the investment has been spent on the Project, this will be aid to the Project.
- A grant towards the costs of a demonstration or pilot project which also has a CFD or forms part of a wider project that has a CFD.
- A grant awarded by an EU regional development fund.
- A grant towards the costs of the construction of the offshore transmission assets.
- A less than market value of transmission costs charged to generators.
- Free or subsidised consultancy advice in relation to the Project.

²⁴ De minimis State aid is (in summary) aid to the beneficiary or any group company to which it belongs that does not exceed a €200,000 threshold over any period of three fiscal years. The De Minimis Regulation is available online here: http://ec.europa.eu/competition/state_aid/legislation/de_minimis_regulation_en.pdf

²⁵ Available online here: <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1404295693570&uri=CELEX:32014R0651>

Table 2: Examples of State Aid that are Unlikely to be Considered Cumulative

- State aid received by a technology provider for the development of their product, which is then sold to the Generator on a commercial basis for use as part of the Project.
- State aid is received for the costs of an additional product or service at a CFD site (e.g. to build an education centre) that is not a requirement for the Project to be delivered under the CFD contract.
- State aid received to undertake research at the Project site or to research a particular product at the CFD site, which is not a requirement of the Project's authorisations and not a requirement for the Project to be delivered.
- State aid for research and development to develop new technologies or processes for wider industry benefit.
- Eligible cost contributions from the Crown Estate that are an investment by the Crown Estate on market value terms.

Annex 2 – State Aid/Union Funding Confirmation

[Generator Name]

[Unique Reference Number: [•]]

(the “Generator”)

CONTRACT FOR DIFFERENCE – STATE AID CONFIRMATION

To: Low Carbon Contracts Company

Fleetbank House

2-6 Salisbury Square

London EC4Y 8JX

(the “CfD Counterparty”)

[Date]

1. We refer to the agreement dated [*insert date*] between you as the CfD Counterparty and us as the Generator in relation to [*name of Project*] (the “Agreement”). Terms and expression defined in or incorporated into the Agreement have the same meanings when used in this confirmation.
2. We further refer you to Condition 3.33.
3. **We confirm that, as of this date, which is not less than three months before our intended Start Date, [no State aid and/or Union Funding has been received by the Generator or by any other person in relation to the costs of the Project (excluding the State aid arising under the Agreement)] / [State aid and/or Union Funding has been received by the Generator or by another person in relation to the costs of the Project (excluding the State aid arising under the Agreement)]. Details of the same are set out below:**

[insert details of the aid/ funding which includes:

- description of the aid/funding including the value
- names of grantor and recipient of the aid/funding
- date the aid/funding was granted
- any other relevant information].

4. We enclose a Directors’ Certificate certifying that the information contained in, and enclosed with, this confirmation is in all material respects true, complete and accurate and not misleading.

This confirmation is governed by and construed in accordance with English law.

.....

Name: [•]

Position: Dated: [•]

Annex 3 – State Aid Declaration – no State aid/ Union Funding received

State Aid Declaration

[Generator Name]

[Unique Reference Number: [•]]

(the “Generator”)

CONTRACT FOR DIFFERENCE – STATE AID DECLARATION

To: Low Carbon Contracts Company
Fleetbank House
2-6 Salisbury Square
London EC4Y 8JX
(the “CfD Counterparty”)

[Date]

1. We refer to the agreement dated **[insert date]** between you as the CfD Counterparty and us as the Generator in relation to **[name of project] (the “Agreement”)**. Terms defined in or incorporated into the Agreement have the same meanings when used in this declaration.
2. We further refer you to the State Aid Declaration Operational CP at paragraph 2.6(A) of Part B of Schedule 1 to the Agreement.
3. We hereby declare on behalf of the Generator that:
 - a) having reviewed and considered the provisions of the Agreement restricting the cumulation of State aid and/or Union Funding with State aid arising under the Agreement;
 - b) having carefully considered the meaning of State aid pursuant to State Aid Rules and of Union Funding, seeking appropriate legal advice where necessary; and
 - c) having made all due and careful enquiries, including of the Generator and other persons connected with the Project, as relevant,

no State aid and/or Union Funding has been received by the Generator or by any other person in relation to the costs of the Project (excluding the State aid arising under the Agreement).

This Declaration is governed by and construed in accordance with English law.

.....

Name: [•]

Position: Dated: [•]

²⁶ Drafting Note: This declaration is intended as evidence of you fulfilling the OCP requirement, but you will still need to provide an OCP Notice (see page 423 of your CFD) and Directors’ Certificate (see page 421 of your CFD). The list of Supporting Information, which should include this declaration, should be annexed to the OCP Notice.

.....

Witness's name: [•]

Occupation: [•]

Address: [•]

Dated: [•]

Annex 4 – State Aid Declaration – State aid/Union Funding has been received

State Aid Declaration

[Generator Name]

[Unique Reference Number: •]

(the “Generator”)

CONTRACT FOR DIFFERENCE – STATE AID DECLARATION

To: Low Carbon Contracts Company
Fleetbank House
2-6 Salisbury Square
London EC4Y 8JX
(the “CfD Counterparty”)

[Date]

1. We refer to the agreement dated **[insert date]** between you as the CfD Counterparty and us as the Generator in relation to **[name of project]** (the “Agreement”). Terms defined in or incorporated into the Agreement have the same meanings when used in this declaration.
2. We further refer you to the State Aid Declaration Operational CP at paragraph 2.6(B) of Part B of Schedule 1 to the Agreement.
3. We hereby declare on behalf of the Generator that:
 - a) having reviewed and considered the provisions of the Agreement restricting the cumulation of State aid and/or Union Funding with State aid arising under the Agreement;
 - b) having carefully considered the meaning of State aid pursuant to State Aid Rules and of Union Funding, seeking appropriate legal advice where necessary; and
 - c) having made all due and careful enquiries, including of the Generator and other persons connected with the Project, as relevant,

State aid and/or Union Funding has been received by the Generator or by another person in relation to the costs of the Project (excluding the State aid arising under the Agreement), however such State aid and/or Union Funding (as applicable) **[and that such State aid and/or Union Funding is expressly authorised by the European Commission to be cumulated with the Agreement. Details of the same are set out below: [Insert details of the aid/funding and EC authorisation including:**

- description of the nature and amount(s) of the aid/funding
- names of the recipient and grantor
- date of receipt of the aid/funding
- date and description of express authorisation by the Commission
- attach a copy the Commission authorisation
- any other relevant information]

[OR]

[and that such State aid and/or Union Funding (as adjusted for interest in accordance with Condition 32.11) has been repaid in full to the granter of the aid or funding. Details of the same are set out below: [Insert details of the aid/funding and repayment including:

- description of the nature and amount(s) of the aid/funding
- names of the recipient and granter
- date of receipt of the aid/funding
- date of the repayment and the amount repaid (including the interest amount repaid)
- any other relevant information]

This Declaration is governed by and construed in accordance with English law.

.....
Name: [•]

Position: Dated: [•]

in the presence of:

.....
Witness's name: [•]

Occupation: [•]

Address: [•]

Dated: [•]

Annex 5 – State Aid Declaration relating to a Request for Waiver of [State Aid Declaration OCP] / [Generator’s obligation to repay State aid and/or Union Funding under Condition 31.4(C)]²⁸

[Generator Name]
[Unique Reference Number: •]
(the “Generator”)

CONTRACT FOR DIFFERENCE – DECLARATION²⁹ RELATING TO A REQUEST FOR WAIVER OF [STATE AID DECLARATION OCP]/[OBLIGATION TO REPAY UNDER CONDITION 31.4(C)]³⁰

To: Low Carbon Contracts Company
Fleetbank House
2-6 Salisbury Square
London EC4Y 8JX
(the “CfD Counterparty”)

[Date]

1. We refer to the agreement dated [insert date] between you as the CfD Counterparty and us as the Generator in relation to [name of project] (the “Agreement”). Terms defined in or incorporated into the Agreement have the same meanings when used in this declaration.
2. We further refer you to [the State Aid Declaration Operational CP at paragraph 2.6(B) of Part B of Schedule 1 to the Agreement] / [the requirement for the Generator to repay State aid and/or Union Funding pursuant to Condition 31.4(C) of the Agreement].³¹
3. We hereby declare on behalf of the Generator that:
 - a) having reviewed and considered the provisions of the Agreement restricting the cumulation of State aid and/or Union Funding with State aid arising under the Agreement;
 - b) having carefully considered the meaning of State aid pursuant to State Aid Rules and of Union Funding, seeking appropriate legal advice where necessary; and
 - c) having made all due and careful enquiries, including of the Generator and other persons connected with the Project, as relevant,

State aid and/or Union Funding has been received by the Generator or by another person in relation to the costs of the Project (excluding the State aid arising under the Agreement), however we have been unable to repay such State aid and/or Union Funding (as applicable) in full together with interest to the grantor of the aid or funding.

²⁸ Delete as applicable depending on which waiver is being requested.

²⁹ Drafting Note: This declaration is intended as evidence of you fulfilling the OCP requirement, but you will still need to provide an OCP Notice (see page 423 of your CFD) and Directors’ Certificate (see page 421 of your CFD). The list of supporting information, which should include this declaration, should be annexed to the OCP Notice.

³⁰ Delete as applicable depending on which waiver is being requested.

³¹ Delete as applicable depending on which waiver is being requested

Details of the same are set out below:

[Please set out detailed information regarding the aid/funding and repayment to include:

- **description of the nature and amount(s) of the aid/funding**
- **amount of the interest and the calculations of same**
- **names of the recipient and grantor**
- **date of receipt of the aid/funding**
- **details of the efforts of the Generator to repay the aid/funding together with the interest to the grantor**
- **detailed explanation of the reasons why the repayment could not be made**
- **any other relevant information**

We attach the following Supporting Information:

[Insert list]

This Declaration is governed by and construed in accordance with English law.

.....

Name: [•]

Position: Dated: [•]

in the presence of:

.....

Witness's name: [•]

Occupation: [•]

Address: [•]

Dated: [•]

Annex 6: Checklist of documents

Requirement	Expected Supporting Information
<p><u>Confirmation provision – Condition 3.33</u></p> <p><i>Subject to Condition 3.34, not less than three (3) months before the Generator’s intended Start Date, the Generator shall give the CfD Counterparty a written confirmation, in form and content satisfactory to the CfD Counterparty (acting reasonably), of whether any State aid and/or Union Funding has been received by the Generator or by any other person in relation to the costs of the Project, and, where applicable, details of all such State aid and/or Union Funding, accompanied by a Directors’ Certificate in relation to the confirmation and the information accompanying it.</i></p>	<ul style="list-style-type: none"> • Written confirmation from the Generator and, if applicable, details of all State aid/ Union Funding received (a pro forma confirmation is set out at Annex 1); and • Directors’ Certificate (see CFD for pro forma) in relation to the written confirmation (and information accompanying it).
<p><u>OCP - Schedule 1, Part B, 2.6 (A)</u></p> <p><i>Delivery to the CfD Counterparty of a written confirmation from the Generator, in form and content satisfactory to the CfD Counterparty (acting reasonably), that no State aid or Union Funding has been received by the Generator or by any other person in relation to the costs of the Project (excluding the State aid arising under this Contract for Difference).</i></p>	<ul style="list-style-type: none"> • Operational CP Notice (see CFD for the pro forma) listing the declaration (mentioned in next bullet point below) as the Supporting Information. • Acceptable ‘written confirmation’ would be a signed declaration from the Generator (a pro forma declaration is set out at Annex 3) • Directors’ Certificate (see CFD for pro forma) in relation to the OCP Notice and declaration.
<p><u>OCP - Schedule 1, Part B, 2.6 (A)</u></p> <p><i>Delivery to the CfD Counterparty of a written confirmation from the Generator, in form and content satisfactory to the CfD Counterparty (acting reasonably), that no State aid or Union Funding has been received by the Generator or by any other person in relation to the costs of the Project (excluding the State aid arising under this Contract for Difference).</i></p>	<ul style="list-style-type: none"> • Operational CP Notice (see CFD for a pro forma) listing the Supporting Information is required. • Acceptable ‘written confirmation’ would be a signed declaration from the Generator which contains details of the aid/funding received and details of the repayment of same (pro forma is set out at Annex 4) <p>Acceptable Supporting Information could be:</p> <ul style="list-style-type: none"> • Evidence of the original amount of aid given from the granter of that aid, e.g. a grant offer letter or funding agreement. • Evidence from the granter of the aid/ funding that they have received repayment of the aid/ funding in full together with interest in accordance with Condition 32.11, such as a receipt and a bank statement. • Calculations showing how the interest has been calculated.
<p><u>OCP - Schedule 1, Part B, 2.1(B)(ii)</u></p> <p><i>Delivery to the CfD Counterparty of a written confirmation from the Generator, in form and content satisfactory to</i></p>	<ul style="list-style-type: none"> • An Operational CP Notice (see CFD for a pro forma) listing the Supporting Information is required.

<p><i>the CfD Counterparty (acting reasonably) that State aid and/or Union Funding has been received by the Generator or by any other person in relation to the costs of the Project (excluding the State aid arising under this Contract for Difference), and that such State aid and/or Union Funding (as applicable) is expressly authorised by the European Commission to be cumulated with the Contract for Difference.</i></p>	<ul style="list-style-type: none"> • Acceptable ‘written confirmation’ would be a signed declaration from the Generator (a pro forma declaration is set out at Annex 4). • Acceptable Supporting Information would be a written decision or letter from the EC to that effect.
<p><u>OCP - Schedule 1, Part B, 2.1(B)(ii)</u></p> <p><i>Delivery to the CfD Counterparty of a written confirmation from the Generator, in form and content satisfactory to the CfD Counterparty (acting reasonably) that State aid and/or Union Funding has been received by the Generator or by any other person in relation to the costs of the Project (excluding the State aid arising under this Contract for Difference), and that such State aid and/or Union Funding (as applicable) is expressly authorised by the European Commission to be cumulated with the Contract for Difference.</i></p>	<ul style="list-style-type: none"> • An Operational CP Notice (see CFD for a pro forma) listing the Supporting Information is required. • Acceptable ‘written confirmation’ would be a signed declaration from the Generator (a pro forma declaration is set out at Annex 4). • Acceptable Supporting Information would be a written decision or letter from the EC to that effect.
<p><u>Request for waiver of OCP – Condition 3.28</u></p> <p><i>The CfD Counterparty shall agree by notice to the Generator to waive the fulfilment of the State Aid Declaration Operational CP if the Generator evidences to the satisfaction of the CfD Counterparty that the granter of such State aid or Union Funding refuses or is unable to accept the repayment of the State aid or Union Funding (as adjusted for interest in accordance with Condition 32.11), in full or in part. If the Generator seeks a waiver of the State Aid Declaration Operational CP, the Generator shall:</i></p> <ol style="list-style-type: none"> a) provide the CfD Counterparty with such Supporting Information as the Generator considers to be relevant to evidence that the granter refuses or is unable to accept repayment, in accordance with this Condition; and b) provide the CfD Counterparty with such additional Supporting Information as the CfD Counterparty reasonably requires, as soon as reasonably practicable, and in any event no later than ten (10) Business Days following receipt of the CfD Counterparty’s request, <p><i>in each case accompanied with a Directors’ Certificate in respect of such Supporting Information.</i></p>	<ul style="list-style-type: none"> • Written request from the Generator for a waiver accompanied by the following: • Declaration from the Generator which sets out details of the aid/ funding received, of the efforts of the Generator to repay such aid/funding to the granter of the aid/funding and of the reasons why the granter has refused or is unable to accept the repayment (pro forma is attached at Annex 6). • Supporting Information could be: <ul style="list-style-type: none"> • clear and unequivocal written confirmation from the granter of the aid/funding that they unconditionally refuse or are unable to accept the repayment of the State aid or Union Funding in full and the reasons for same; and • evidence to show that they were in fact the granter of the aid (e.g. a receipt, invoice etc.). • Director’s Certificate in relation to the Supporting Information (see CFD for pro forma).

Request for waiver of Generator's obligation to repay State aid and/or Union Funding at Condition 31.4(C)

The CfD Counterparty shall agree by notice to the Generator to waive the Generator's obligation under Condition 31.4(C) if the Generator evidences to the satisfaction of the CfD Counterparty that the granter of such State aid or Union Funding refuses or is unable to accept the repayment of the State aid or Union Funding (as adjusted for interest in accordance with Condition 31.10), in full or in part. If the Generator seeks a waiver, the Generator shall:

- a) provide the CfD Counterparty with such Supporting Information as the Generator considers to be relevant to evidence that the granter refuses or is unable to accept repayment in accordance with this Condition; and
- b) provide the CfD Counterparty with such additional Supporting Information as the CfD Counterparty reasonably requires, as soon as reasonably practicable, and in any event or later

- Written request from the Generator for a waiver accompanied by the following:
- Declaration from the Generator which sets out details of the aid/ funding received, of the efforts of the Generator to repay such aid/funding to the granter of the aid/funding and of the reasons why the granter has refused or is unable to accept the repayment (pro forma is attached at Annex 6).
- Supporting Information could be:
 - clear and unequivocal written confirmation from the granter of the aid/funding that they unconditionally refuse or are unable to accept the repayment of the State aid or Union Funding in full and the reasons for same; and
 - evidence to show that they were in fact the granter of the aid (e.g. a receipt, invoice etc.).

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